Nordin bin Salleh & Anor v Dewan Undangan Negeri Kelantan & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO R1-22-11-91
EUSOFF CHIN J
8 NOVEMBER 1991

Constitutional Law *— Fundamental liberties — Right to form associations — State constitution providing that member of Legislative Assembly who ceases to be or is expelled from a political party shall cease to be member of Legislative Assembly — Whether article infringes right to freedom of association guaranteed under Federal Constitution — Test to applied in determining if article infringes fundamental right — Federal Constitution art 10 — Laws of the Constitution of Kelantan (First Part) (Amendment) Enactment 1991 art XXXIA*

The plaintiffs were elected to the Dewan Undangan Negeri Kelantan (Kelantan State Assembly) during general elections held on 21 October 1990 and were subsequently sworn in as members. On 25 April 1991, the first defendant passed the Enakmen Undang-Undang Perlembagaan Tubuh Kerajaan Kelantan (Bahagian Pertama) (Pindaan) 1991 (Laws of the Constitution of Kelantan (First Part) (Amendment) Enactment 1991) and introduced a new art XXXIA (which has retrospective effect from 19 November 1990) reading as follows:

'(1) If any member of the Legislative Assembly who is a member of a political party resigns or is expelled from, or for any reasons whatsoever ceases to be a member of such political party, he shall cease to be a member of the Legislative Assembly and his seat shall become vacant.

(2) For the purpose of Clause (1) the Legislative Assembly shall determine whether a seat has become vacant or as to when a seat becomes vacant and the determination of the Assembly shall be final and shall not be questioned in any Court on any ground whatsoever.'

On 3 July 1991 the first defendant passed a resolution pursuant to the impugned legislation that the first and second plaintiffs had ceased to be members of the Dewan Undangan Negeri Kelantan and declared the seats for the constituencies of Sungai Pinang and Limbongan vacant. By reason of the vacancies the Election Commission of Malaysia (the third defendant) took steps to hold by-elections in the aforesaid constituencies and the by-elections were held and completed on 26 August 1991. In the by-elections, the plaintiffs stood for election as candidates for the Barisan Nasional but lost. The plaintiffs sought an order declaring that art XXXIA of the Kelantan State Constitution is invalid, null and void as it is ultra vires the provisions of art 10(1)(c) of the Federal Constitution. The plaintiffs contend that the new art XXXIA of the Kelantan State Constitution is inconsistent with the provisions of art 10(1)(c) of the Federal Constitution and is therefore void under art 4(1) of the Federal Constitution.

Held, allowing the application:

(1) Article 10(2) of the Federal Constitution authorizes only Parliament and not a state legislative assembly to make law to impose restrictions on the fundamental right of a citizen to form associations. The restriction may be imposed as Parliament deems it necessary only in the interest of the security of the Federation or any part thereof, public order, or morality. The word 'morality' means sexual morality and not political morality.

(2) The test to be applied in determining whether a statute infringes a particular fundamental right is what is the direct and inevitable consequence or effect of the impugned statute on the fundamental right of the plaintiffs, and if the effect of the statute on the fundamental right is direct or inevitable, then a fortiori the effect must be presumed to have been intended by the statute. Where, therefore, the statute directly affects the fundamental right, or its inevitable effect on the fundamental right is such that it makes exercise of the right ineffective or illusory, the statute must be held to be unconstitutional, and must be struck down.

(3) It is clear that art XXXIA of the Kelantan State Constitution imposes a restriction on the exercise by the plaintiffs of their right of association guaranteed by art 10(1)(c) of the Federal Constitution, that is, if they resign from their political party, they would be disqualified from continuing as a member of the state legislative assembly.

(4) Prima facie, art XXXIA implies that a penalty is attracted for exercising their fundamental right guaranteed by art 10(1)(c) of the Federal Constitution. Therefore, the inevitable effect or consequence of art XXXIA on the fundamental right of association of the plaintiffs is that it makes the exercise of their right ineffective or illusory.

(5) If the phrase 'for any reasons whatsoever' contained in the impugned art XXXIA of the Kelantan State Constitution is meant to include resignation of membership of a political party then that part of the art XXXIA is also inconsistent with the provision of art 10(1)(c) of the Federal Constitution and is void under art 4(1) of the Federal Constitution.

[Bahasa Malaysia summary

Plaintif telah dipilih menganggotai Dewan Undangan Negeri Kelantan semasa pilihanraya umum yang dilangsungkan pada 21 Oktober 1990 dan kemudiannya telah mengambil sumpah menjadi ahli dewan itu. Pada 25 April 1991, defendan pertama telah meluluskan Enakmen Undang-Undang Perlembagaan Tubuh Kerajaan Kelantan (Bahagian Pertama) (Pindaan) 1991 dan memperkenalkan perkara XXXIA yang baru (yang mempunyai kesan retrospektif dari 19 November 1990) seperti berikut:

'(1) If any member of the Legislative Assembly who is a member of a political party resigns or is expelled from, or for any reasons whatsoever ceases to be a member of such political party, he shall

cease to be a member of the Legislative Assembly and his seat shall become vacant.

(2) For the purpose of Clause (1) the Legislative Assembly shall determine whether a seat has become vacant or as to when a seat becomes vacant and the determination of the Assembly shall be final and shall not be questioned in any Court on any ground whatsoever.'

Pada 3 Julai 1991 defendan pertama telah meluluskan satu ketetapan mengikut perundangan yang dicabar itu bahawa plaintif pertama dan kedua telah berhenti menjadi ahli Dewan Undangan Negeri Kelantan dan mengumumkan bahawa kerusi bagi bahagian pilihanraya Sungai Pinang dan Limbongan kosong. Memandangkan kekosongan itu, Suruhanjaya Pilihanraya Malaysia (defendan ketiga) telah mengambil tindakan untuk melangsungkan pilihanraya kecil di bahagian pilihanraya tersebut dan pilihanraya kecil telah dilangsungkan dan diselesaikan pada 26 Ogos 1991. Dalam pilihanraya kecil itu, plaintif telah menjadi calon Barisan Nasional tetapi telah dikalahkan. Plaintif meminta perintah mengisytiharkan yang perkara XXXIA Perlembagaan Negeri Kelantan terbatal dan tidak sah kerana ia ultra vires perkara 10(1)(c) Perlembagaan Persekutuan. Plaintif berhujah bahawa perkara XXXIA baru dalam Perlembagaan Negeri Kelantan itu bercanggahan dengan perkara 10(1)(c) Perlembagaan Persekutuan dan kerana itu ia tidak sah di bawah perkara 4(1) Perlembagaan Persekutuan.

Diputuskan, membenarkan permohonan itu:

(1) Perkara 10(2) Perlembagaan Persekutuan hanya memberi kuasa kepada Parlimen dan bukan dewan undangan negeri untuk membuat undang-undang mengenakan sekatan ke atas hak asasi seorang warganegara untuk membentuk persatuan. Sekatan boleh dikenakan sebagaimana Parlimen menganggap perlu hanya untuk kepentingan keselamatan persekutuan atau sebarang bahagiannya, ketenteraman awam atau akhlak.

(2) Ujian yang harus dipakai untuk menentukan sama ada sesuatu statut melanggar satu hak asasi yang tertentu ialah apakah kesudahan atau kesan yang langsung dan tidak dapat dielak statut yang dicabar itu atas hak asasi plaintif, dan jikalau kesan statut itu atas hak asasi adalah langsung dan tidak dapat dielak, dengan demikian a fortiori kesan itu semestinya dianggap sebagai tujuan statut itu. Akibatnya, di mana statut itu secara langsung membawa kesan atas hak asasi, atau kesannya yang tidak dapat dielak atas hak asasi itu adalah sedemikian rupa sehingga ia membuat penjalanan hak itu tidak berkesan atau menjadi impian, statut itu harus dianggap tidak berperlembagaan, dan harus dibatalkan.

(3) Jelas bahawa perkara XXXIA Perlembagaan Negeri Kelantan mengenakan sekatan atas plaintif mempergunakan hak mereka untuk menyertai persatuan yang dijamin oleh perkara 10(1)(c) Perlembagaan Persekutuan, iaitu, jika mereka berhenti menjadi ahli parti politik mereka, mereka akan dilarang daripada terus menjadi ahli dewan undangan negeri.

(4) Prima facie, perkara XXXIA membayangkan bahawa akibat menggunakan hak asasi yang dijamin oleh perkara 10(1)(c) Perlembagaan Persekutuan satu penalti akan dikenakan. Oleh kerana itu, kesan atau kesudahan perkara XXXIA yang tidak dapat dielak ke atas hak asasi plaintif untuk menyertai persatuan adalah ia membuat penjalanan hak mereka tidak berkesan atau menjadi impian.

(5) Jika rangkai kata 'for any reasons whatsoever' yang terkandung di dalam perkara XXXIA Perlembagaan Negeri Kelantan yang dicabar itu bermaksud meliputi hal meninggalkan keahlian parti politik, maka bahagian perkara XXXIA itu adalah bercanggahan dengan perkara 10(1)(c) Perlembagaan Persekutuan dan tidak sah di bawah perkara 4(1) Perlembagaan Persekutuan.]

Cases referred to

1 *Minister of Home Affairs & Anor v Fisher & Anor* [1979] 3 All ER 21 (refd)
2 *Dato Menteri Othman bin Baginda v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 (refd)
3 *Ong Ah Chuan v PP* [1981] 1 MLJ 64 (refd)
4 *Raja Kulkami v State of Bombay* AIR 1951 Bom 105 (refd)
5 *Tika Ramji & Ors v State of UP* AIR 1955 SC 676 (refd)
6 *Mian Bashir Ahmad & Ors v State of Jammu & Kashmir & Ors* AIR 1982 J & K Section 26 (refd)
7 *Smt Maneka Gandhi v Union of India* AIR 1978 SC 597 (folld)
8 *Abdul Karim bin Abdul Ghani v Legislative Assembly of Sabah* [1988] 1 MLJ 171 (distd)

Legislation referred to

Federal Constitution of Malaysia arts 4(1), 10(1)(c), (2)(c), 71(4)
Enakmen Undang-Undang Perlembagaan Tubuh Kerajaan Kelantan (Bahagian Pertama) (Pindaan) 1991 art XXXIA

Zaki Tun Azmi and *Juliana Solomon* (*Rashid & Lee*) for the plaintiffs.
Zainur Zakaria and *Zulkifli Nordin* (*Zainur Zakaria* & Co) for the defendants.

Cur Adv Vult

Eusoff Chin J: The facts of the case had been agreed to by the parties, and they are:

(a) The plaintiffs were elected to the Dewan Undangan Negeri Kelantan during the general elections held on 21 October 1990 and subsequently sworn in as members.
(b) On 25 April 1991 the first defendant passed the Enakmen Undang-Undang Perlembagaan Tubuh Kerajaan Kelantan (Bahagian Pertama) (Pindaan) 1991.

(c) On 3 July 1991 the first defendant passed a resolution pursuant to the impugned legislation that the first and second plaintiffs had ceased to be members of the Dewan Undangan Negeri Kelantan and declared the seats for the constituencies of Sungai Pinang and Limbongan vacant.

(d) By reason of the vacancies the Election Commission of Malaysia took steps to hold by-elections in the aforesaid constituencies, with the dates of nominations of candidates fixed for 12 August 1991 and the by-elections held and completed on 26 August 1991.

(e) In the by-elections aforesaid, the plaintiffs stood for election as candidates of the Barisan Nasional but lost.

The Enactment mentioned in para (b) of the agreed facts amended Part One of the Constitution of the State of Kelantan (hereinafter referred to as 'the Kelantan State Constitution') by introducing a new art XXXIA which states as follows:

Vacation of seat due to resignation, etc from political party

XXXIA(1) If any member of the Legislative Assembly who is a member of a political party resigns or is expelled from, or for any reasons whatsoever ceases to be a member of such political party, he shall cease to be a member of the Legislative Assembly and his seat shall become vacant.

(2) For the purpose of Clause (1) the Legislative Assembly shall determine whether a seat has become vacant or as to when a seat becomes vacant and the determination of the Assembly shall be final and shall not be questioned in any Court on any ground whatsoever.

Although the State Legislative Assembly, Kelantan passed the Enactment on 25 April 1991, art XXXIA was made to have retrospective effect to 19 November 1990.

The plaintiffs have sought a number of orders, but both parties agreed that the main prayer should be first heard and determined by the court since the other prayers are for consequential orders. The main prayer is for an order declaring that art XXXIA of the Kelantan State Constitution is invalid, null and void as it is ultra vires the provisions of art 10(1)(c) of the Federal Constitution.

Encik Zaki Tun Azmi, learned counsel for the two plaintiff, submitted that the plaintiffs are not contending that the State Legislative Assembly of Kelantan had no power to make that law (art XXXIA) but that that art XXXIA is inconsistent with the provisions of art 10(1)(c) of the Federal Constitution, and because of that, art XXXIA of the Kelantan State Constitution is void under art 4(1) of the Federal Constitution.

Article 4(1) of the Federal Constitution states:

Supreme law of Federation

4(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Encik Zainur Zakaria, learned counsel for the defendants, and Encik Zaki, informed me that they would be citing as authorities the decisions of the

courts in India since art 10 of the Federal Constitution and art 19 of the Constitution of India contained provisions relating to rights of citizens to form associations. For ease of reference I quote both the relevant provisions here:

Federal Constitution of Malaysia		Constitution of India	
Art 10 (1) Subject to Clauses (2), (3) and (4) —		19 (1) All citizens shall have the right —	
Freedom of speech, assembly and association	(a) every citizen has the right to freedom of speech and expression;	Protection of certain rights regarding freedom of speech, etc.	(a) to freedom of speech and expression;
	(b) all citizens have the right to assemble peaceably and without arms,		(b) to assemble peaceably and without arms;
	(c) all citizens have the right to form associations.		(c) to form associations or unions.
(2) *Parliament* may by law impose —		...	
	...	(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent *the State* from making any law imposing, in the interest of *the sovereignty and integrity of India or* public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.	
	(c) On the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.		
(3) Restrictions on the right to form associations conferred by paragraph (c) of Clause (1) may also be imposed by any law relating to labour or education.			

(Emphasis added.)

It is to be noted that whereas the Federal Constitution authorizes only Parliament to make law to impose restrictions on the right to form associations, the Indian Constitution authorizes a state to do so. The word 'State' under art 2 of the Indian Constitution means an individual state or state legislative assembly. Both the said art 10(2)(c) and art 19(4) specify two common grounds on which restrictions may be imposed on the right to form associations, ie 'in the interest of ... public order or morality'. The other ground on which restriction may be imposed in Malaysia, is: 'in the interest of the security of the Federation', and in India: 'in the interest of the sovereignty and integrity of India'. There is another difference, and it is

A that whereas in India the restrictions on the exercise of the freedom to form associations must be reasonable, in Malaysia, that restriction need not be reasonable because art 10(2)(c) of the Federal Constitution does not say so. It is sufficient if Parliament deems it necessary and expedient.

Both learned counsel, on authorities cited, do not dispute that the right to form associations means a citizen's right to form, to join, not to join or B resign from an association.

It is to be noted that art 10 of the Federal Constitution is placed under Part II, and under the title 'Fundamental Liberties', and art 19 of the Indian Constitution is placed under Part III of their Constitution under the title 'Fundamental Rights'.

C It is necessary to examine the principles of interpretation of a written constitution. In *Minister of Home Affairs & Anor v Fisher & Anor*,[1] the question was whether under s 11(5)(d) of the Constitution of Bermuda the word 'child' or 'step child' included an illegitimate child, and, if it did, then the illegitimate child was said to 'belong to Bermuda' and no restriction could be imposed on his freedom of movements or residence in Bermuda, D nor could the child be expelled from Bermuda. It was urged that the principles of interpretation of an ordinary Act of Parliament should be applied. The Privy Council held that the word 'child' included an illegitimate child. Lord Wilberforce said in this Privy Council judgment [at p 25]:

> E Here, however we are concerned with a Constitution, brought into force certainly by Act of the United Kingdom Parliament, the Bermuda Constitution Act 1967, but established by a self-contained document set out in Sch 2 to the Bermuda Constitution Order 1968. It can be seen that this instrument has certain special characteristics. It is, particularly in Chapter I, drafted in a broad and ample style which lays down principles of width and generality. Chapter I is headed 'Protection of Fundamental Rights and Freedoms of the Individual'. It F is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the constitutions of most Carribean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms. That convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn G influenced by the United Nations Universal Declaration of Human Rights 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. Section II of the Constitution forms part of Chapter I. It is thus to 'have effect for the purpose of affording protection to the aforesaid rights and H freedoms' subject only to such limitations contained in it 'being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice ... the public interest'.
>
> When therefore it becomes necessary to interpret 'the subsequent provisions of' Chapter I (in this case s 11) the question must inevitably be asked whether the appellant's premise, fundamental to their argument, that these provisions are to I be construed in the manner and according to the rules which apply to Acts of Parliament, is sound. In their Lordships' view there are two possible answers to this. The first would be to say that, recognizing the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with

property, or succession, or citizenship. On the particular question this would require the court to accept as a starting point the general presumption that 'child' means 'legitimate child' but to recognize that this presumption may be more easily displaced. The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.

It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a constitution. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.

This principle of interpreting a written constitution was applied by the Federal Court in *Dato Menteri Othman bin Baginda v Dato Ombi Syed Alwi bin Syed Idrus*[2] at p 32 and by the Privy Council in *Ong Ah Chuan v PP*[3] at p 70, ie a constitutional instrument is sui generis calling for principles of interpretation of its own suitable to its character, but without necessarily accepting the ordinary rules and presumption of a statutory interpretation. A constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way.

Freedom of association has been described as 'a claim of the individual to be permitted to establish relations with others of his own choosing, for the purpose of obtaining for the whole group, usually against outside individuals or groups, some special strength or advantage in the pursuit of a common end': *Fundamental Rights and the Constitution*, a case book by RKW Goonesekere, at p 304.

The freedom to form an association necessarily includes the negative rights of not joining an association in as much as the right to form an association, necessarily implies the freedom or volition to form or not to form, to join or not join an association — *Raja Kulkami v State of Bombay.*[4] Hence to compel a person by law to become a member of an association is clearly a violation of his fundamental right — *Tika Ramji & Ors v State of UP.*[5]

It was submitted by Encik Zainur that the impugned art XXXIA of the Kelantan State Constitution does not prevent a member of the legislative assembly who is a member of a political party from resigning his membership of that political party, and because of that the said art XXXIA is not inconsistent with art 10(1)(c) of the Federal Constitution. He further contended that the two plaintiffs were elected members and therefore their right to continue to be members of the state legislative assembly is not a fundamental right but a statutory right, and this statutory right can be removed by a law made by the state legislative assembly relating to disqualifications of membership of that legislative assembly.

Encik Zaki, on the other hand, submitted that the question of the right to be a member of the state legislative assembly is not the issue before the court. What is in issue is whether art XXXIA of the Kelantan State Constitution is inconsistent with art 10 of the Federal Constitution, and if

A it is so, it is invalid. What the plaintiffs are questioning is that art XXXIA has restricted them from exercising their right of association which is a fundamental right, guaranteed by art 10(1)(c) of the Federal Constitution.

Encik Zainur has, therefore, based his argument on the right of the Kelantan State Legislative Assembly to enact laws pertaining to disqualifications of members of the Kelantan State Legislative Assembly. He also B argued, and cited authorities, that a member of a state legislative assembly (or Parliament) has no fundamental right but only a statutory right to his seat in Parliament or a state legislative assembly. I do not doubt that a member of a state legislative assembly may be disqualified from holding his seat by the legislative assembly if he infringes any law relating to disqualiC fication. But the issue to be first decided by this court is whether the law under which the state legislative assembly took action to remove the member from his seat, is itself valid.

In *Mian Bashir Ahmad & Ors v State of Jammu & Kashmir & Ors*,[6] the High Court held that if a statute itself violates any of the fundamental rights enshrined in Part III of the Indian Constitution the statute would be D invalidated irrespective of the fact whether any action has been taken under it. Consequently, it is possible to challenge the legislation as being violative of any of the fundamental rights even if no action has been taken under it.

In *Mian Bashir*'s case[6] the Acting Chief Justice and one of the judges came to one conclusion, (which I shall refer to as 'the majority view'), while E two other judges came to a different conclusion (which I shall refer to as 'the minority view'). In *Mian Bashir*'s case[6] the petitioners had challenged the validity of a new section, which was s 24G of the J & K Representation of the People Act as violating the provisions of art 19(1)(a) and (c) of the Indian Constitution. For ease of reference I quote that s 24G which is as follows:

F

> Disqualification for being a member of either House of Legislature
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> A person shall be disqualified for being a member of the Legislative Assembly or the Legislative Council of the State:
>
> (a) if he, having been elected as such member voluntarily gives up his membership of the political party by which he was set up as a candidate in such election or of which he becomes a member after such election;
> (b) If he votes or abstains from voting in such House contrary to any direction or whip issued by such political party or by any person authorised by it in this behalf without obtaining prior permission of such party or person.
>
> Explanation: For the purposes of this section political party means:
>
> (a) A political party classified as a recognised political party under any law or any rule, regulation, order or notification having the force of law with respect to matters relating to, or in connection with, election to the Legislative Assembly or the Legislative Council of the State;
> (ii) Any other political party which is recognised by the Speaker of the Legislative Assembly or, as the case may be, by the Chairman of the Legislative Council, as a political party.

G H I

The judges in the majority view had examined the objects and reasons leading to the passing of the amendment (s 24G). They found that the

driving force behind the Act was the 'widespread concern over the problems of political defections', and the baneful effect that they had on the functioning of democracy in India. They also considered the history of virulent politics of defections since 1967 which resulted in the Lok Sabha and in many of the state legislative assemblies unable to hold a two-thirds majority, and in most of them, no single political party was in a position to form a government. The Acting Chief Justice, Mufti Baha-Ud-Din, said that it was a settled principle that in dealing with the constitutionality of a legislative enactment with reference to fundamental rights, the court must have regard to the pith and substance and not merely to the form and appearance, and the validity of the Enactment must be tested by its direct and immediate effect. He said that it was also a settled principle in India, that in order to determine the true nature and character of a legislative enactment it is permissible to take into consideration the history behind the enactment, the evils that it was intended to eradicate and the circumstances under which it was enacted. Having examined the materials before him, he was of the view that 'political defections are now an order of the day in this State, and more so in other States in India, and that they generally take place not because of genuine proddings of conscience but because of personal aggrandizement and rank opportunism. They have become a pernicious form of political corruption threatening the function of parliamentary democracy contemplated by the Constitution which has necessitated the legislation. Viewed against this background, it cannot be said that the object of this section (24G) is merely to curb dissent, but the object, truly and properly understood, is to eradicate the evil of political defection in the State. In the actual operation, however, the direct and inevitable effect of the section is the legislator's liberty to vote in the legislature is impaired and, moreover, he will not be able to leave his party habitat so long as he continues to be a legislator. It is *in the light of the background* that we have to consider the validity of the impugned section' (emphasis added).

The Acting Chief Justice further said at paras 29 and 30 of his judgment:

> 29 That takes me to the second contention of the learned counsel that the impugned section violates the fundamental right of the petitioner guaranteed under art 19(1)(c) which is the right to form association or unions. His argument is that the impugned section abridges the petitioners' right to withdraw his membership of the political party to which he belongs and, so viewed, it restricts his freedom of dissociation which is an integral part of the freedom of association guaranteed under art 19(1)(c). To me, it appears that the argument is not well conceived. The impugned section does not prevent the petitioner from withdrawing his membership of a political party but it only lays down that he shall not continue as a legislator if he withdraws his membership of the political party to which he is attached. Thus, what the impugned section really does is that it takes away the right to continue as a member of the legislature. Viewed in this light, the impugned section cannot be invalidated. For, there is no fundamental right in any person to continue as a member of the legislature. The right to stand as a candidate for the election and the right to continue as a member after such election is a statutory right which can be validly and reasonably taken away by a statute. [*Jamuna Prasad Mukhariya* v *Lachhi Ram* AIR 1954 SC 686; *Sakhawant Ali*

v State of Orissa AIR 1955 SC 166; and *Ebrahim Sulaiman Sait v MC Moohamed* AIR 1980 SC 354 at p 357].

30 Even if it is taken that the impugned section restricts the right of the petitioner to withdraw his membership of a political party, the restriction cannot be treated as a fetter on his right of dissociation assuming that such right is an inalienable part of right of association guaranteed under art 19(1)(c). I say so both on principle and authority. It will be noticed that the impugned section nowhere compels a person to become a member of any political party. He is entitled to join or not any political party at his choice. If he once joins it, he is also entitled to withdraw his membership at his choice and *the only impediment* in his way is the fact of being a member of the legislature. Until he continues to be a member of the legislature, he cannot resign the membership of his party without being prepared to forgo such membership. This might create a difficulty in the matter of a person being able to resign the membership of a political party, but that does not mean that there is an absolute restriction on his right of resignation. Accordingly it cannot be said that the impugned section interferes with the right of association guaranteed to the petitioner under art 19(1)(c).

On the other hand, Dr Anand J in the minority view in *Mian Bashir*'s case[6] stated at paras 54, 55, 89, 90, 94, 100 to 102 of his judgment:

54 The petitioners have assailed the vires of the aforesaid section principally on the following grounds:

...

(2) That it is also unconstitutional as it violates the petitioner's fundamental right guaranteed under art 19(1)(c) of the Constitution of India and is not protected by art 19(4).

...

(6) That s 24G is ultra vires and void as it destroys the basic structure of the Constitution.

55 The question being legal, the facts pale into insignificance, and in any case would be relevant for deciding the references made by the Speaker of the legislative assembly only. Suffice it to say, that the petitioners are aggrieved of the threat of disqualification on the grounds that they have voluntarily resigned the membership of the political parties on whose ticket they were elected as members after their election to the assembly and have thus incurred the disqualification imposed by the impugned legislation.

89 Article 19(1)(c) of the Constitution provides that all citizens shall have the right to form an association or union. This right has been held by the Supreme Court to include within its sweep, the right to disassociate from an association also. In *OK Ghosh v EX Joseph* AIR 1963 SC 812 their Lordships opined *that any restriction to disassociate from an association, would make the guaranteed right under art 19(1)(c) of the Constitution 'ineffective and even illusory'*. I have already opined that whatever fundamental rights are available to a citizen cannot be denied to a citizen on his election as a legislator *as these rights inhere in every citizen including a legislator.*

90 ... It is the reasonableness of the restriction and not the reasonableness of law or the laudability of the legislation which has to be found out. The restriction has to be reasonable from a substantive point of view.

94 ... Can this ('constitutional right' of a legislator) be taken away as a punishment or penalty for his exercising his fundamental right guaranteed

under art 19(1)(c)? In my opinion the answer must be *in the negative*. When the Constitution guarantees to the citizen, the rights under art 19(1)(c) those certainly cannot be taken away when the citizen is elected as a legislator. Legislators, as a class, cannot be denied the enjoyment of the guaranteed rights under art 19(1)(c). *If a citizen is to be punished for exercising his fundamental rights, then that punishment must have a constitutional sanction.* No ordinary legislation can penalize any citizen for exercising his fundamental rights guaranteed under art 19(1)(c) subject of course to the limitations contained in art 19(4). Section 24G(a) directly and substantially impinges upon the right guaranteed under art 19(1)(c) and makes the right 'illusory' in so far as the legislators belonging to a 'recognized' political party are concerned.

100 In my opinion, therefore, it is not possible to hold that the legislators, as a class, do not have the fundamental right of association as is available to the citizens under art 19(1)(c).

101 ... The legislation can be, of course, struck down if it directly infringes the fundamental rights of a legislator but it can also be struck down *if the inevitable consequences of the legislation is to prevent the exercise of the fundamental right* guaranteed under art 19(1)(c) or to make the exercise of that right 'ineffective or illusory'.

102 In this connection, it is relevant to bear in mind that it is not the form but the effect of the legislation which is relevant and *the court has to consider the direct and inevitable effect of the impugned legislation on the fundamental rights.* In *Smt Maneka Gandhi v Union of India* AIR 1978 SC 597 (at pp 632, 633), it was opined:

> 'The law on the test or yardstick to be applied for determining whether a statute infringes a particular fundamental right has undergone radical change since the days of *Gopalan*'s case AIR 1950 SC 27. In *RC Cooper*'s case AIR 1970 SC 564, the doctrine that the object and form of the state action alone determine the extent of protection that may be claimed by an individual and that the effect of the state action on the fundamental right of the individual is irrelevant as laid down in *Gopalan*'s case was finally rejected. This doctrine is in substance and reality nothing else than the test of pith and substance which is applied for determining the constitutionality of legislation where there is conflict of legislative powers conferred on Federal and state legislatures with reference to legislative lists. The test applied since *RC Cooper*'s case was as to *what is the direct and inevitable consequence or effect of the impugned state action on the fundamental right of the petitioner.* It is possible that in a given case the pith and substance of the state action may deal with a particular fundamental right but its direct and inevitable effect may be on another fundamental right and in that case, the state action would have to meet the challenge of the latter fundamental right, the pith and substance doctrine looks only at the objection and object matter of the state action, but in testing the validity of the state action with reference to fundamental rights, what the court must consider is the direct and inevitable consequence of the state action. Otherwise the protection of the fundamental right would be eroded.'

Their Lordships explained:

> 'Therefore, the word, "direct" would go to the quality or character of the effect and not to the subject matter.'

and added that the criterion of 'inevitable' consequence 'helps to quantify the extent of direction necessary to constitute infringement of a

A fundamental right. Now, if the effect of state action on a fundamental right is direct and inevitable, then a fortiori it must be presumed to have been intended ... this is the test which must be applied for the purpose of determining whether the impugned order made under it is violative of art 19(1)(a) or (g).'

Thus it follows that if the inevitable consequence of the impugned legislation is to curb the fundamental rights, then it must be held to be ultra vires and unconstitutional. 'Direct and inevitable effect' as used in the aforesaid judgment does not imply that before an action can be struck down as unconstitutional, it has to be established that it has both a direct effect as well as inevitable effect on the exercise of fundamental rights. The action would be struck down if either it directly affects the fundamental rights or its inevitable effect on the fundamental rights is such that it makes their exercise 'ineffective or illusory'. Since the inevitable effect of s 24G(a) is that it makes the exercise of right of association guaranteed under art 19(1)(c) ineffective and illusory in so far as the legislators are concerned, it must be held to be unconstitutional.

103 ... The impugned legislation seeks to punish a legislator either for exercising his fundamental rights under art 19(1)(a) or under art 19(1)(c). The disqualification prescribed by s 24G, thus, makes a mockery of the guaranteed fundamental rights of the legislators as contained in arts 19(1)(a) and 19(1)(c) and unreasonably restricts their exercise by the legislators. *They can exercise those rights only on the pain of suffering disqualification of continuing as members of the legislature.* Thus, even if enacted under s 69(1)(e) the impugned section is not only unconstitutional as offending the fundamental rights but also invalid and inoperative as infringing ss 72 and 52 of the Constitution.

104 In view of what has been said above, the conclusion is irresistable that cl (a) of s 24G is violative of art 19(1)(c) of the Constitution and is not protected by art 19(4).

It will be seen that in arriving at their decision the judges in the majority view in *Mian Bashir*'s case[6] had applied the test of 'reasonableness' which was allowed by art 19(4) of the Indian Constitution. They held that the object of the impugned s 24G was truly and properly to eradicate the evils of political defections. They were also of the view that the impugned s 24G did not stop a legislator joining or resigning his membership of a political party. The only impediment was that if the legislator chose to leave a political party he had to lose his seat in the legislature. They were of the opinion that the right of a legislator to sit and retain his seat in the legislature was not a fundamental right but only a statutory right. They, therefore, held that the amendment (s 24G) was valid as it only took away the statutory right but not the fundamental right of a legislator and therefore, under the circumstances, it was a reasonable restriction imposed on a legislator under art 19(4) of the Indian Constitution.

The minority view in *Mian Bashir*'s case[6] dealt with the subject matter from another angle. The judges there were of the view that art 19(1)(c) of the Indian Constitution guaranteed a citizen the right of association and that this freedom is a fundamental right which remains throughout with the citizen even when he is elected as a member of the legislative assembly.

Dr Anand J stated that it is the reasonableness of the restriction and not the reasonableness of the law or the credibility or the laudability of the

legislation which has to be found out. He was of the view that the impugned s 24G imposed a punishment or penalty on a legislator for exercising his fundamental right guaranteed under art 19(1)(c) of the Indian Constitution. When the Indian Constitution guarantees to the citizen the rights under art 19(1)(c), the rights cannot be taken away when a citizen is elected as a legislator. If a citizen is to be punished for exercising his fundamental rights, then that punishment must have a constitutional sanction.

As I have stated earlier, art 19(4) of the Indian Constitution allows reasonable restrictions to be imposed on the right of a citizen to exercise his right of association. But art 10(2)(c) of our Federal Constitution does not specify the imposition of reasonable restrictions. It authorizes Parliament to impose, by law, 'such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality'. Reasonableness is not material in art 10(2)(c) of the Federal Constitution.

I have also stated earlier that art 10(2) of the Federal Constitution authorizes only Parliament and not a state legislative assembly to make law to impose restrictions on the fundamental rights of a citizen to form associations. The question is whether art XXXIA of the Kelantan State Constitution imposes any restriction on a citizen's right to form associations which is guaranteed by art 10(1)(c) of the Federal Constitution. It is true that art XXXIA of the Kelantan State Constitution does not directly prohibit a member of the state legislative assembly from resigning from a political party, but that if he does so, he shall cease to be a member of the assembly and his seat may be declared vacant by the assembly.

Article XXXIA of the Kelantan State Constitution is not concerned with whether a member of the state legislative assembly was elected on a political party ticket to the assembly. He may be elected as an independent candidate, then joins a political party and while still a member of the assembly, resigns from that political party. In such a situation, he will still lose his seat in the assembly under this art XXXIA. The main object and purpose of art XXXIA is to prevent a member of the assembly who is, or since the date of his election, has become a member of a political party, from leaving that political party for whatever reasons. It also has the object of ensuring that a party member should be loyal to his party and follow the directions of his party in carrying out his functions in the assembly or else the party may expel him from the party, resulting in his losing his seat in the assembly.

It was also submitted to me by Encik Zainur that this art XXXIA is one relating to disqualification of members of the state legislative assembly of Kelantan. I must point out that the law relating to disqualifications of members of a state legislative assembly is contained in s 6, Part I of the Eighth Schedule of the Federal Constitution. Under art 71(4) of the Federal Constitution the provisions in Part I of the Eighth Schedule must be incorporated in the Constitution of a state. Article 71(4) of the Federal Constitution states:

> If at any time the Constitution of any State does not contain the provisions set out in Part I of the Eighth Schedule, with or without the modifications allowed under Clause (5) (hereinafter referred to as 'the essential provisions') or provisions substantially to the same effect, or contains provisions inconsistent with the

A essential provisions, Parliament may, notwithstanding anything in this Constitution, by law make provision for giving effect in that State to the essential provisions or for removing the inconsistent provisions.

It appears that the Kelantan State Legislative Assembly may enact laws relating to the disqualification of its members. But these laws if enacted B after Merdeka Day (31 August 1957) would be valid only if they are not inconsistent with the provisions of the Federal Constitution. It is the duty of this court to determine if art XXXIA of the Kelantan State Constitution is valid. If it is valid it can be enforced and actions taken under it.

Is art XXXIA of the Kelantan State Constitution wholly inconsistent with the provision of art 10(1)(c) of the Federal Constitution? Surely if a C member of a political party is expelled by his party, it cannot be said that the member is exercising or is prevented from exercising his right under art 10(1)(c) of the Federal Constitution. But if his right to resign his membership of a political party is restricted in any way otherwise than by what is authorized by art 10(2)(c), that restriction is unconstitutional.

D Article XXXIA of the Kelantan State Constitution also specifies that if a member of the assembly 'for any reasons whatsoever' ceases to be a member of a political party, he shall cease to be a member of the assembly and his seat shall become vacant. The words 'for any reasons whatsoever' is a phrase of wide import which includes resignation from membership of a political party. Does this phrase also include a situation when the political E party is dissolved? But so long as this phrase is not intended to include resignation from a political party, or imposition of any restriction on the exercise of any fundamental right guaranteed by the Federal Constitution, I think it is not unconstitutional. It is of course better to have these words rephrased to avoid any ambiguity in its application.

F The test to be applied in determining whether a statute infringes a particular fundamental right was settled in India in *Smt Maneka Gandhi v Union of India*[7] where it was held that the correct test to be applied was as to what is the direct and inevitable consequence or effect of the impugned statute on the fundamental right of the plaintiffs, and if the effect of the statute on the fundamental right is direct or inevitable, then a fortiori the G effect must be presumed to have been intended by the statute. Where, therefore, the statute directly affects the fundamental right, or its inevitable effect on the fundamental right is such that it makes the exercise of the right ineffective or illusory, the statute must be held to be unconstitutional, and must be struck down.

H Applying this test, it is crystal clear that article XXXIA of the Kelantan State Constitution imposes a restriction on the exercise, by the plaintiffs here, of their right of association guaranteed by art 10(1)(c) of the Federal Constitution. Although the plaintiffs may resign from a political party, they may only do so upon pain or penalty of losing their seats in the Kelantan State Legislative Assembly. In other words if they resign from their political I party, they would be disqualified from continuing as a member of the state legislative assembly. Thus, prima facie it implies that a penalty is attracted for exercising their fundamental right guaranteed by art 10(1)(c) of the Federal Constitution. Therefore, the inevitable effect or consequence of art XXXIA of the Kelantan State Constitution on the fundamental right of

association of the plaintiffs is that it makes the exercise of their right ineffective or illusory. This art XXXIA of the Kelantan State Constitution must be held to have imposed a restriction on the exercise of the fundamental right of a member of the state legislative assembly, to resign the membership of a political party; and to *that extent*, this art XXXIA must be held to be unconstitutional under art 4(1) of the Federal Constitution as it infringes and is inconsistent with art 10(1)(c) of the Federal Constitution.

Encik Zainur Zakaria drew my attention to the decision of Hashim Yeop A Sani SCJ (as he then was), in *Abdul Karim bin Abdul Ghani* v *Legislative Assembly of Sabah*.[8] That case dealt with an application for leave made under art 4(4) of the Federal Constitution to commence proceedings for a declaration that a law is invalid on the ground that the legislature of the State of Sabah had no power to make that law. That law was an amended art 18 of the Constitution of the State of Sabah which added a new provision, cl 2(d), similar to the provisions contained in art XXXIA of the Kelantan State Constitution. The learned Supreme Court judge dismissed the application holding that the Sabah State Legislative Assembly had power to enact the amendment. It is to be noted that in *Abdul Karim*'s case[8] the validity of the amended law was being challenged on the sole ground that the State Legislative Assembly Sabah had no power to enact the amendment to the said art 18. I would treat the other views expressed by the learned Supreme Court judge there as obiter dicta since the points raised before me were never raised or argued before him then.

In the case before me, the plaintiffs conceded that the Kelantan State Legislative Assembly has the power to enact the law on disqualification of its members, but that the law as enacted, which is art XXXIA of the Kelantan State Constitution, is void under art 4(1) of the Federal Constitution because it is inconsistent with the provisions of art 10(1)(c) of the Federal Constitution.

For the reasons given, I find that only Parliament may enact law to impose any restriction on the exercise of the fundamental right of a citizen to associate which is guaranteed under art 10(1)(c) of the Federal Constitution. Further, the restriction may be imposed as Parliament deems it necessary only in the interest of the security of the Federation or any part thereof, public order or morality. The word 'morality' has been held in *Mian Bashir*'s case[6] to mean and be restricted to 'sexual morality', and not 'political morality'.

A state legislative assembly has no power to enact law to impose any restriction on that right, and if it does so, that part of the law which is inconsistent with the provision of art 10(1)(c) of the Federal Constitution is void under art 4(1) of the Federal Constitution. The impugned art XXXIA of the Kelantan State Constitution has the inevitable effect of restricting the exercise by the plaintiffs of their fundamental right to resign from a political party, and to that extent this art XXXIA of the Kelantan State Constitution is unconstitutional, and is therefore void. If the phrase 'for any reasons whatsoever' contained in the impugned art XXXIA of the Kelantan State Constitution is meant to include resignation of membership of a political party (which I think it does) then that part of the art XXXIA

A is also inconsistent with the provision of art 10(1)(c) of the Federal Constitution, and is void under art 4(1) of the Federal Constitution.

Encik Zaki also submitted that art XXXIA is invalid because it was passed by the Kelantan State Legislative Assembly to have retrospective effect to 19 November 1990. It must be borne in mind that in this case the Kelantan State Legislative Assembly was not exercising a delegated power B to enact this law, and in view of the findings I have made, I do not think it necessary for me to deal with this submission here.

I therefore make the order declaring that art XXXIA of Part One of the Constitution of the State of Kelantan is inconsistent with art 10(1)(c) of the Federal Constitution and is void under art 4(1) of the Federal Constitution C to the extent only that it imposes a restriction on the exercise of the fundamental right of a member of the Kelantan State Legislative Assembly to resign his membership of a political party.

Application allowed.

D Reported by Wong Kim Fatt

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